

1204 FIRST DEGREE SEXUAL ASSAULT: AGAINST AN INDIVIDUAL WHO IS 60 YEARS OF AGE OR OLDER — § 940.225(1)(d)

Statutory Definition of the Crime

First degree sexual assault, as defined in § 940.225(1)(d) of the Criminal Code of Wisconsin, is committed by [CHOOSE ONE OF THE FOLLOWING]¹.

- [one who has sexual (contact) (intercourse) with another person who is 60 years of age or older without consent and by use or threat of force or violence]
- [one who has sexual (contact) (intercourse) with another person who is 60 years of age or older without consent and causes (injury) (illness) (disease or impairment of a sexual or reproductive organ) (mental anguish requiring psychiatric care)]
- [one who has sexual (contact) (intercourse) with a person who is 60 years of age or older who suffers from a mental illness or deficiency which renders that person temporarily or permanently incapable of appraising the person's conduct, and the defendant knows of such condition]
- [one who has sexual (contact) (intercourse) with a person who is 60 years of age or older who is under the influence of an intoxicant to a degree which renders that person incapable of giving consent if the defendant has actual knowledge that the person is incapable of giving consent and has the purpose to have sexual (contact) (intercourse) with the person while the person is incapable of giving consent]
- [one who has sexual (contact) (intercourse) with a person who is 60 years of age

or older who the defendant knows is unconscious]

- [one who has sexual (contact) (intercourse) with another person who is 60 years of age or older without consent and is aided and abetted² by one or more other persons]
- [one who is an employee of a (type of facility or program)³ and has sexual (contact) (intercourse) with a (patient) (resident) of that (facility) (program) who is 60 years of age or older]
- [a correctional staff member who has sexual (contact) (intercourse) with an individual who is 60 years of age or older who is confined in a correctional institution]⁴
- [a (probation) (parole) (extended supervision) agent who has sexual (contact) (intercourse) with an individual who is 60 years of age or older on (probation) (parole) (extended supervision), and who supervises that individual in his or her capacity as an agent]⁵
- [a licensee, employee, nonclient resident, of an entity, who has sexual (contact) (intercourse) with a client of the entity who is 60 years of age or older]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following _____⁶ elements were present.

Elements of the Crime That the State Must Prove

1. (Name of victim) was 60 years of age or older at the time of the offense.

Knowledge of (name of victim)'s age by the defendant is not required and a mistake regarding the (name of victim)'s age is not a defense.⁷

[LIST THE ELEMENTS OF THE CRIME CHARGED UNDER § 940.225(2) AS INDICATED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS OF THE UNIFORM INSTRUCTION AS NECESSARY]⁸

Jury's Decision

If you are satisfied beyond a reasonable doubt that all _____⁹ elements of first degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1204 was approved by the Committee in December 2021.

This instruction is drafted for offenses involving first degree sexual assault of an individual who is 60 years or older as provided in Wis. Stat 940.225(1)(d). § 940.225(1)(d) was created by 2021 Wisconsin Act 76 [effective date: August 8, 2021].

Section 940.225(1)(d) recognizes ten grounds for committing first-degree sexual assault against an individual who is 60 years of age or older. The Committee concluded that the best way to address the complexity that has resulted is to provide a single model instruction which can be modified to refer to the appropriate violation provided in subsection 940.225(2). For an example showing how the instruction would read when typical alternatives are selected, see Wis JI-Criminal 1204 EXAMPLE.

1. The applicable definition should be selected. The alternatives are those provided in sub. 940.225(2)(a) through (j).

2. Section 940.225(2)(f) uses the phrase “aided or abetted” (emphasis added). Since traditional criminal statutes have referred to “aiding and abetting,” the Committee has used that construction in

the instruction. The Committee feels that this does not change the meaning of the statute or of the aiding and abetting concept. In State v. Thomas, 128 Wis.2d 93, 381 N.W.2d 567 (Ct. App. 1985), the court held that “aided or abetted” in § 940.225(1)(c) has the same meaning as the phrase “aids and abets” in § 939.05 and therefore is not unconstitutionally vague.

3. Section 940.225(2)(g) was amended by 1993 Wisconsin Act 445. The former statute applied to an employee of “an inpatient facility or a state treatment facility.” The revised statute applies to an employee of “a facility or program under s. 940.295(2)(b), (c), (h) or (k).” Those facilities or programs are:

- (2)(b) an adult family home
- (2)(c) a community-based residential facility
- (2)(h) an inpatient health care facility
- (2)(k) a state treatment facility

The Committee recommends naming the type of facility in this paragraph, for example: “. . . an employee of a state treatment facility.”

4. This paragraph does not apply if the individual with whom the actor has sexual contact or sexual intercourse is subject to prosecution for the sexual contact or sexual intercourse under this section.

5. This paragraph does not apply if the individual with whom the actor has sexual contact or sexual intercourse is subject to prosecution for the sexual contact or sexual intercourse under this section.

6. Insert the appropriate number of elements from the uniform instruction for the crime charged as modified under § 940.225(1)(d).

7. This is the standard statement that is used in other instructions where the victim’s age is an element and is based on the complementary rules stated in §§ 939.23(6) and 939.43(2). Although both of those statutes refer to “the age of a minor,” sub. (4) of § 940.198 provides a similar rule for this offense: “This section applies irrespective of whether the defendant had actual knowledge of the crime victim’s age. A mistake regarding the crime victim’s age is not a defense to prosecution under this section.” The Committee concluded that the standard statement is clearer; no change in meaning is intended.

8. For comments and footnotes applicable to the predicate offense, refer to the comment section of the specific uniform instruction. See Wis JI-Criminal 1208 – 1217A.

9. Insert the appropriate number of elements from the uniform instruction for the crime charged as modified under § 940.225(1)(d).